No. 88-1378

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRANK MCNEIL, *et al.*,
Petitioners,
v.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT NO. 186,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The brief of the respondent [1] does not spend much time discussing whether certiorari should nor should not be granted, but instead argues various points about the merits of the case which are not dispositive of the issue presented by the petition. The first three points made by the respondent are: (1) that the word "majority" in

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[1] Pursuant to Rule 19.6 of the rules of this Court, the Springfield School District No. 186 has indicated that it wishes to remain a party to this litigation despite the fact that it has abandoned its prior at-large election system. However, the school district waived its right to respond to the substantive questions presented by the petition for certiorari. Accordingly, this reply brief will refer only to the arguments of respondent Springfield Park District, which did file a brief addressing the substantive questions.

Thornburg v. Gingles, 478 U.S. 30 (1986), means voting age majority, Brief in Opp., pp. 4-8, (2) that respondent's position is supported by lower court case law, *id.* at 8-11, and (3) that summary judgment is sometimes appropriate in vote dilution cases. *Id.* at 12-16. These points are not dispositive in the sense that, even if respondent were correct on all of them, the respondent still would not have refuted the central contentions which support a grant of certiorari in this case: (1) that regardless of the definition of the word "majority," *Gingles* specifically left open the issue presented in this case, *see* Pet., pp. 9-15, and (2) that the *per se* rule adopted by the Court of Appeals is inconsistent with Congress' intent and is therefore wrong. *Id.* at 15-18.

The fourth, and only other, point made by the respondent is that the Court of Appeals' decision affects only so-called "marginal" cases where no effective remedy is available. Brief in Opp., pp. 16-18. Yet the respondent simply makes this assertion in a conclusory fashion, offers no supporting facts or analysis, and fails to rebut the petitioners' contention that this case involves a recurring issue, the resolution of which will affect a large number of minority voters. *See* Pet., pp. 18-22.

This reply brief will be organized around the four points made by the respondent in its brief in opposition. Before proceeding to those four points, however, it is important to note that the respondent never discusses what is absolutely crucial in this case of statutory construction: whether Congress intended the Voting Rights Act to incorporate the kind of strict *per se* limits imposed by the Seventh Circuit. The only reference to Congressional intent in the respondent's entire brief is an unsupported statement, made in passing, that reversal of the Seventh Circuit would violate Congress' wishes by leading to a right of proportional representation. That argument, plainly incorrect, is dealt with in Section I of this reply brief. *Infra* at 5 n.3.

I. EVEN IF THE WORD "MAJORITY" AS USED IN *GINGLES* REFERS TO VOTING AGE MAJORITY, *GINGLES* LEFT OPEN THE ISSUE IN THE PRESENT CASE OF WHETHER MINORITY CITIZENS CAN EVER CHALLENGE AT-LARGE ELECTIONS WHERE THEY WOULD BE LESS THAN A MAJORITY OF THE VOTING AGE POPULATION IN A SINGLE-MEMBER DISTRICTING PLAN.

The respondent makes much of the contention that the word "majority" as used in Justice Brennan's opinion in *Gingles* meant voting age majority. Brief in Opp., pp. 4-8. Of course, Justice Brennan's opinion never said "voting age majority," but simply said "majority." In the present case, black citizens would make up a majority of the total population of a single-member district.

Even if Justice Brennan unequivocally intended the word "majority" to mean voting age majority, that does not refute the fact that *Gingles* did not confront, and specifically left unresolved, the question of whether a claim against at-large elections under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, can ever be maintained when minority citizens would be less than a majority of the voting age population in a single-member districting plan. 478 U.S. at 46-47 n.12, and 48-50; *id.* at 89-90 n.1 (O'Connor, J., concurring). The different ways in which *Gingles* left this question open are discussed in detail at pp. 11-15 of the petition for certiorari.

With respect to the use of the word "majority" in *Gingles*, it is important to recognize that Justice Brennan's opinion was talking about whether minority citizens would have a "*potential* to elect" candidates of their choice in a single-member remedial plan. 478 U.S. at 50 n.17 (emphasis in original). Showing that minority citizens would constitute a majority in a single-member district may be the paradigmatic way of demonstrating the potential to elect. But, as is clear from the qualifiers,

reservations, and analysis contained both in Justice Brennan's and Justice O'Connor's opinions, *see* Pet., pp. 11-15, *Gingles* left open the possibility of demonstrating a potential to elect even with something slightly less than a majority of the voting age population. Thus, the use of the word "majority" in Justice Brennan's opinion does not foreclose the claim made by the black citizens of Springfield, Illinois in this case, or similar claims of racial discrimination made by other minority citizens around the country.

The respondent contends that a majorty of voting age population is *always* necessary to demonstrate a potential to elect candidates of choice. Brief in Opp., p. 7 ("[o]nly a majority of those eligible to vote can establish the potential to elect"); *id.* at 8. This is refuted by the very text of *Gingles* itself, which indicates that a number of factors other than the racial composition of a jurisdiction are relevant to an ability to elect. 478 U.S. at 55-56.[2] Moreover, if respondent were correct that anything less than 50% voting age population is never sufficient for minority voters to have a potential to elect, all at-large election systems in majority white jurisdictions would be unlawful *per se* under Section 2. This is because minority voters, comprising less than 50% of the voting age population in those jurisdictions, would be presumed unable to elect candidates of choice under the at-large systems. That sort of legal result would be contrary to the intent of Congress and the statement of this Court

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[2] These factors include the extent of bloc voting; the presence or absence of majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of minority voter registration and turnout in the district; the size of the district; the number of candidates in the field; and, in multimember districts, the number of seats open. 478 U.S. at 55-56. Pages 7-8 of the brief of *amici curiae* in support of the petition for certiorari outline a number of ways in which minority voters can elect candidates of choice even with something short of a majority of the voting age population in a given district.

in *Gingles* that at-large elections are not automatically violative of Section 2. 478 U.S. at 46.[3]

II. THE STATE OF THE LOWER COURT CASE LAW, AND THE FREQUENCY WITH WHICH THIS ISSUE ARISES, JUSTIFY A WRIT OF CERTIORARI TO RESOLVE THE ISSUE.

Respondent attempts to paint a monolithic picture of lower court decisions both pre- and post-*Gingles* uniformly reaching the same holding as the Seventh Circuit in this case. Brief in Opp., pp. 8-10, 12-13. While it is certainly true that a number of other lower courts have joined the Seventh Circuit in limiting the scope of Section 2 when faced with this issue, *see* Pet., pp. 19-20, the matter is not as free of conflict as respondent suggests. Three points deserve mention.

First, a number of the cases cited by respondent, Brief in Opp., pp. 10, 12-13, did not even remotely address the issue which is presented in this case. These include *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. pending*, No. 88-606; *Buckanaga v. Sisseton Independent School District No. 54-5*, 804 F.2d 469 (8th Cir. 1986); *Gomez v. City of Watsonville*, 863 F.2d 1407

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[3] Respondent does not discuss Congressional intent on this point, or any other, except to say that reversal of the Seventh Circuit would violate Congressional will by instituting proportional representation. Brief in Opp., p. 18. Respondent seems to miss the point that all plaintiffs seek at this stage of the case is a decision that would reverse the summary judgment and allow them a trial of their racial discrimination claim. Plaintiffs would still have to prove at trial that the current at-large system dilutes their voting strength, and they could not meet that burden simply by showing that minorities have failed to achieve proportional representation in Springfield. *See Thornburg v. Gingles*, 478 U.S. at 46. Thus, the plaintiffs are not claiming a *per se* right to proportional representation, and reversal of the Seventh Circuit would in no way establish such a right.

(9th Cir. 1988); and *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988).

Second, both pre- and post-*Gingles* cases indicate some conflict with the *per se* standard utilized by the Seventh Circuit in the present case. *See East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988); *Major v. Treen*, 574 F. Supp. 325, 330-336, 351-352 (E.D. La. 1983) (three-judge court); *Wilkes County, Georgia v. United States*, 450 F. Supp. 1171 (D.D.C.) (three-judge court), *aff'd*, 439 U.S. 999 (1978).[4] Thus, this is an issue about which disagreement does exist in the courts.[5]

Third, the respondent's discussion of the lower court cases only reiterates the point at pp. 18-22 in the petition for certiorari that the present case involves an issue which arises frequently in the lower courts, and is in need of resolution by this Court.

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[4] The *East Jefferson* case is discussed at p. 21 of the petition for certiorari, and *Major v. Treen* and *Wilkes County* are discussed at pp. 5-6 n.3 of the brief *amici curiae* in support of the petition. Respondent's suggestion that *East Jefferson* and *Major* may be distinguishable because they were remedy cases and not liability cases, Brief in Opp., p. 14, is totally wrong. The reported decisions in both cases dealt with the liability phase of the case. Respondent never explains its further contention that, because *Major* was a "redistricting" case, its holding is somehow inapplicable to the issue of a minority group's potential to elect in a remedial plan. *Id.*

[5] The conflict over this issue is reflected not only in lower court decisions, but also in the scholarly criticism of the rule adopted by the Court of Appeals in this case. *See* the citations at p. 21 of the petition for certiorari.

III. THAT SUMMARY JUDGMENT MAY BE APPROPRIATE IN SOME SECTION 2 CASES DOES NOT ANSWER THE QUESTION OF WHETHER THE SEVENTH CIRCUIT'S NARROW *PER SE* STANDARD IS AN APPROPRIATE BASIS FOR GRANTING SUMMARY JUDGMENT.

The third section of the respondent's brief is devoted to the concept that summary judgment may be appropriate in some Section 2 cases. Brief in Opp., pp. 12-16. The petitioners do not quarrel with that, *see* Pet., p. 14 n.7, but simply contend that the Seventh Circuit's mechanistic *per se* standard for summary judgment conflicts with Congressional intent, *id.* at 15-18, and with the rationale of *Gingles*. *Id.* at 13-14.

In this same section of its brief, the respondent asserts that the petitioners' claim is "tied specifically" to footnote 12 of *Gingles*, which discusses an "ability to influence elections," and also asserts that the record is inadequate for review of an "influence" claim. Brief in Opp., pp. 13-14. This is wrong in several respects.

First, the petitioners' contention that *Gingles* left this issue open is not "tied" only to footnote 12, but stems from footnote 12 and a number of other aspects of *Gingles*' language, structure, and analysis, all of which are detailed at pp. 11-15 of the petition for certiorari.

Second, the evidence presented by petitioners in the district court in response to the motion for summary judgment demonstrates that black citizens could *elect* candidates of their choice in the proposed single-member district, where they would be under a majority in voting age population but over a majority in total population. *See* Pet., pp. 4-5. Whether that makes this an "ability to influence" case or an "ability to elect" case is immaterial to the larger point that this raises an issue which has yet to be resolved by this Court.

Third, the respondent in no way explains how the record in this case is "inadequate" for resolution of the

issue. Clearly, the record demonstrates, sufficient to survive summary judgment, that minority citizens in the proposed district can elect candidates of choice,[6] and the only question before this Court is the legal question of whether minority citizens are automatically precluded from the coverage of Section 2 where they constitute anything less than a majority of the voting age population in a remedial plan. That question is presented squarely by this case, and should be resolved in the context of this case.

IV. AS THE RECORD IN THE PRESENT CASE DEMONSTRATES, THE DECISION OF THE COURT OF APPEALS EXCLUDES MERITORIOUS RACIAL DISCRIMINATION CLAIMS WHERE AN EFFECTIVE REMEDY IS AVAILABLE.

The respondent claims, rather briefly and without any supporting analysis, that this issue will encompass only marginal cases where no effective remedy is available. Brief in Opp., pp. 16-17. Of course, that assumes the conclusion that a district with less than 50% minority voting age population can never allow minority voters to elect candidates of choice, and therefore is *per se* ineffective.

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[6] Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The evidence presented by the petitioners in response to the motion for summary judgment shows, at the very least, a genuine issue of fact suggesting that minority citizens can, as a practical matter, elect candidates of choice from the proposed district. Thus, the only remaining question is whether that fact is *material*. If, as the Seventh Circuit held, minority citizens can never invoke Section 2 unless they are over 50% of the voting age population in a single-member district alternative, then the practical ability to elect in the proposed district would not constitute a material fact. If, on the other hand, the 50% voting age population figure is not a *per se* and unalterable bar to Section 2 claims, then that fact is material, and plaintiffs are entitled to a trial.

The respondent's argument is belied by the facts of the present case. In election after election, black candidates supported by the overwhelming majority of black voters have won in the precincts comprising the proposed district. Pet., pp. 4-5. Thus, if petitioners ever receive a trial, and are able to demonstrate that the existing at-large system prevents them from electing candidates of choice, there is no question but that the alternative single-member district will give them that opportunity and will be an effective remedy.

By focusing simply on whether or not a 50% voting age majority can be obtained in a single-member district, the Seventh Circuit's rule fails to differentiate between the marginal and the meritorious cases, between the cases where an effective remedy is available and those where it is not.[7] All the petitioners are asking this Court to do is review the Seventh Circuit's *per se* rule and determine whether factors other than the 50% voting age population figure should be considered in evaluating

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[7] Respondent states that a bright line 50% voting age population rule is necessary to prevent judges from relying on "raw intuition" and "judicial speculation" in deciding both the liability and remedy phases of vote dilution cases. Brief in Opp., p. 17. That is simply wrong. Congress gave the courts extensive guidance regarding the relevant evidentiary factors to be examined in connection with what Section 2 calls the "totality of circumstances." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 28-29 (1982) (report of the Senate Judiciary Committee on the 1982 Voting Rights Act extension), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177. But nowhere did Congress prescribe or suggest such a bright-line rule. Moreover, in order to determine whether an ability to elect exists in a proposed remedial district in a case like the present case, courts need simply look at the electoral patterns, such as the election returns showing that the candidates of choice of black voters in Springfield won in the precincts comprising the proposed district. Pet., pp. 4-5. That is not "raw intuition," but instead reflects the type of analysis which courts make of the electoral reality in a given jurisdiction in any Section 2 case. *See Thornburg v. Gingles*, 478 U.S. at 55-56 (listing a number of relevant factors to be examined by judges in deciding Section 2 claims).

the viability of a racial discrimination challenge under Section 2.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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